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No. 80-1924

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CASPAR W. WEINBERGER, Secretary of Defense, *et al.*,
Petitioners,

v.

ANTHONY M. ROSSI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICI CURIAE FOR THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, CHRISTOPHER COLLINS, ROBERT PLANT AND ALBERT SALAZAR

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QUESTION PRESENTED

Whether the meaning of the word "treaty" used in Section 106 of Pub. L. No. 92-129 is limited to international agreements approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution, or encompasses other international agreements as well.

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE), Christopher Collins, Robert Plant and Albert Salazar file this brief as *amici curiae* in support of Respondents in this action.

INTEREST OF THE AMICI CURIAE

The American Federation of Government Employees is a labor union affiliated with the AFL-CIO; the only AFL-CIO affiliate by whose charter is responsible solely for organizing federal and District of Columbia government workers. AFGE represents more than 700,000 employees of the federal government in the United States and overseas. Some AFGE members are employed by the United States in countries where the preferential hiring agreements at issue in this case are in force (*i.e.*, Spain, Turkey, Panama and Germany (Pet. Br. 6, n. 4-5)). As is discussed below, the rights of these particular AFGE members will be directly affected by the outcome of this case.

At issue in this case is whether the term "treaty" in Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note, is limited in meaning to international agreements approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution, or, alternatively, encompasses all international agreements entered into by the United States.

Essentially, Section 106 prohibits employment discrimination by the Department of Defense against United States citizens working overseas, unless such discrimination is permitted by a "treaty."

There presently exist numerous agreements between the United States and other countries which provide that the nationals of those countries will be given preference in employment at American military bases located in their countries. (Pet. Br. 4-5). None of the current preferential-employment agreements are "treaties" as that term is defined in Article II of the Constitution.[1]

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[1] Petitioners assert in their brief (Pet. Br. 6, n. 5) that the 1953 North Atlantic Treaty Organization Status of Forces Agreement, 4 U.S.T. 1792 (1953) (NATO SOFA), is an Article II treaty. This assertion is incorrect when applied to the status of the

Should this Court accept the definition of the term "treaty" that is urged by Respondents (the Article II definition), the Department of Defense would have no legal basis upon which to discriminate against United States citizens it employs overseas. Acceptance by this Court of Petitioners' definition of the term "treaty" would result, in all likelihood, in the displacement of AFGE members by foreign nationals in the countries where preferential-employment agreements are in force. By urging this Court to accept Respondents' definition of the term "treaty," AFGE is fulfilling its legal obligation to protect the interests of its members.

As is mentioned by Petitioners (Pet. Br. 7, n. 5), Christopher Collins, Robert Plant and Albert Salazar are plaintiffs in a lawsuit in which they allege that they were reduced in grade or fired as a result of preferential treatment being given to German nationals during a reduction-in-force, in violation of Section 106. *Collins v. Brown*, Civ. No. 79-2598 (D.D.C., filed Sept. 28, 1979). Defendants in *Collins* claim that their contested actions were taken pursuant to the NATO-SOFA agreements, 4 U.S.T. 1792 (1953); 14 U.S.T. 531 (1963), and that the actions were therefore within the ambit of discrimination permitted by Section 106. The parties in *Collins* disagree as to whether the NATO-SOFA agreements are

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NATO-SOFA between the United States and the Federal Republic of Germany (FRG).

The FRG, as an occupied power, was not a party to the NATO-SOFA when that agreement was approved by the Senate. Although the FRG became a party to NATO in 1955 with Senate approval, 101 CONG. REC. 4201, 4232-33 (1955), the 1953 NATO-SOFA was not extended to the FRG until 1963, at the time of enactment of the NATO-SOFA Supplementary Agreement, 14 U.S.T. 531 (1963). The 1963 NATO-SOFA was never submitted to the Senate for its approval. Therefore, contrary to Petitioners' assertions, Amici maintain that there is no Article II treaty in force between the United States and the FRG which provides for the preferential employment of German nationals.

Article II treaties in relation to the Federal Republic of Germany,[2] and whether only an Article II treaty would legitimize the discrimination alleged by plaintiffs to have occurred. The *Collins* case is currently pending on cross motions for summary judgment.

This Court's determination of the proper definition of the term "treaty," as that word is used in Section 106, will certainly bear upon the decision of the District court in *Collins*, and could be determinative of that case. Therefore, Collins, Plant and Salazar, as well as AFGE, have a direct and compelling interest in the outcome of this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the Court of Appeals held invalid a provision in the 1968 Base Labor Agreement in force between the United States and the Republic of the Philippines. 19 U.S.T. 5892 (1968). The invalidated clause provided that Philippine nationals would be given preference in employment over Americans, in regard to jobs with the United States Armed Forces in the Philippines. The discriminatory provision was held to violate Section 106 of Pub. L. No. 92-129.

Section 106 prohibits the Department of Defense from discriminating against Americans overseas unless such discrimination is permitted by a "treaty."

The Court of Appeals held that although the Base Labor Agreement was an international agreement, it had not been approved by the United States Senate pursuant to Article II of the Constitution, and therefore was not a "treaty" within the "treaty" exception to Section 106.

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[2] See note 1, *supra*.

Petitioners assert that the agreement at issue in this case does not violate Section 106. They assert that any binding international agreement to which the United States is a party would fall within the "treaty" exception to Section 106. Respondents assert that the "treaty" exception found in Section 106 can only be satisfied by a "treaty" complying with Article II, Section 2, Clause 2 of the Constitution (*i.e.*, an international agreement which has been approved by the United States Senate). Amici support the position advanced by Respondents.

a. Amici urge this Court to hold that the term "treaty" in Section 106 refers solely to international agreements that have been approved by the Senate pursuant to Article II of the Constitution. In so doing, they are asking this Court to accept the ordinary, customary usage of the term "treaty" under the laws of the United States. Under our laws, usually only those international agreements carrying the imprimatur of Senatorial approval may be classified as "treaties." In most instances, even international agreements signed by the President (known as executive agreements) will not be considered "treaties" if they have not been approved by the Senate.

Petitioners urge this Court to reject the ordinary meaning of the term "treaty" in favor of a broader meaning which would encompass executive agreements and other international agreements. In order to prevail upon that theory, Petitioners must carry the burden of proving that the intent of Congress in enacting Section 106 would be promoted by defining the term "treaty" in Section 106 in such a way that it would encompass more than just Article II "treaties." *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

b. The legislative history of Section 106 reveals that the 92d Congress intended Section 106 to be a means of curtailing discrimination committed against United

States citizens by the Department of Defense. In enacting Section 106, Congress was aware that existing international agreements between the United States and other nations fostered discrimination against American citizens. Congress had not been consulted before these agreements had been entered into.

By stating in Section 106 that employment discrimination against Americans would only be permitted if provided for in an Article II "treaty" (a "treaty" that could only come into force after Senate approval), Congress was insuring that Americans would not be discriminated against without its knowledge and approval.

c. In legislation enacted contemporaneously with Section 106 (the Case Act, 1 U.S.C. § 112b, and Senate Resolution 214, 92d Cong., 2d Sess. (1972)), the 92d Congress explicitly distinguished between Article II "treaties" and other international agreements, such as executive agreements. The 92d Congress' use of the term "treaty" in the Case Act and Senate Resolution 214 indicates that when using the term "treaty" in Section 106, the 92d Congress was referring to international agreements approved by the Senate pursuant to Article II of the Constitution.

d. If the term "treaty" in Section 106 is construed to mean only Article II treaties, there would exist fewer international agreements under which Americans could legally be discriminated against, than if the term "treaty" is construed more broadly. The intent of Congress in enacting Section 106 was to curb discrimination against Americans. Therefore, construing the term "treaty" in Section 106 as being limited to Article II treaties, would promote the purposes of Congress in enacting Section 106 to a greater extent than would a broader construction.

ARGUMENT

THE WORD "TREATY" USED IN SECTION 106 OF PUB. L. NO. 92-129 MEANS AN INTERNATIONAL AGREEMENT WHICH HAS BEEN APPROVED BY THE UNITED STATES SENATE PURSUANT TO ARTICLE II, SECTION 2, CLAUSE 2 OF THE CONSTITUTION

A. If Defined In Accordance With the Ordinary Meaning of the Word "Treaty" Under the Laws of the United States, the Word "Treaty" Used in Section 106 of Pub. L. No. 92-129 Means An International Agreement Which Has Been Approved By The United States Senate Pursuant to Article II, Section 2, Clause 2 of the Constitution

Essentially, this case involves the construction of Section 106 of Pub. L. No. 92-129, 85 Stat. 355, codified at 5 U.S.C. § 7201 note, which reads as follows:

> "Unless prohibited by treaty, no person shall be discriminated against by the Department of Defense or by any officer or employee thereof, in the employment of civilian personnel at any facility or installation operated by the Department of Defense in any foreign country because such person is a citizen of the United States or is a dependent of a member of the Armed Forces of the United States. As used in this section, the term 'facility or installation operated by the Department of Defense' shall include, but shall not be limited to, any officer's club, noncommissioned officer's club, post exchange, or commissary store."[3]

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[3] The Court of Appeals below was of the opinion that replacing the phrase "[u]nless prohibited by" with either the words "unless permitted by" or "unless provided by" would convey more precisely the meaning of the statute. *Rossi v. Brown*, 642 F.2d 553, 558 n. 21 (D.C. Cir. 1980).

1. ***Pursuant to the Laws of the United States, the Word "Treaty" Ordinarily Means An International Agreement Which Has Been Approved By the United States Senate Pursuant to Article II, Section 2, Clause 2 of the Constitution***

Article II, Section 2, Clause 2 of the Constitution provides that the President "shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."

The term "treaty" used in Article II of the Constitution has been said to include any international agreement, so long as the agreement "is of such a nature as to require the advice and consent of the Senate to ratification by the President." 5 G. Hackworth, *Digest of International Law* 1 (1943).

This narrow definition of the term "treaty" has been followed in the draft *Restatement of the Foreign Relations Law of the United States.* Section 302 of the *Restatement* provides:

> § 302. Definitions: Law of the United States (a) "Treaty" means an international agreement made by the President with the advice and consent of the Senate, two-thirds of the Senators present concurring.

Restatement of the Foreign Relations Law of the United States § 302 (Tent. Draft 1 Apr. 1980).

In 1975, the Acting Assistant Legal Advisor for Treaty Affairs of the Department of State conveyed the following meaning of the term "treaty," as used in the United States:

> ". . . in the United States the term "treaty" is normally used to indicate an international agreement that is to be or has been brought into force with respect to the United States by and with the advice and consent of the Senate in conformity with Arti-

> cle II of the Constitution. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement," see 14 Whiteman, *Digest of International Law* 1, or simply as an "international agreement," see *Restatement of the Foreign Relations Law of the United States, Second*, Section 117 *et seq.* (1975) and Henkin, *Foreign Affairs and the Constitution* 173 (1072)."

Letter from John Boyd, Acting Assistant Legal Advisor for Treaty Affairs, to General Accounting Office Assistant General Counsel James Masterson, dated Aug. 8, 1975 (A. 220, 222).

The Department of State reiterated its 1975 definition of the term "treaty" in 1977, when the Acting Assistant Secretary of State for Congressional Relations wrote:

> "In the United States, the term "treaty" is . . . most frequently used to indicate an international agreement brought into force with respect to the United States in conformity with . . . Article II. An international agreement brought into force with respect to the United States in any other manner is usually referred to as an "executive agreement."

Letter from Kempton Jenkins, Acting Assistant Secretary of State for Congressional Relations, to Senator Henry M. Jackson, dated Feb. 7, 1977 (A. 207, 208).

2. Pursuant to the Laws of the United States, International Agreements Which Have Not Been Approved By the United States Senate Are Not Ordinarily Defined As "Treaties"

a. As is alluded to in the definitions of the term "treaty" set forth above, the United States may enter into international agreements which are not treaties in terms of Article II. Such international agreements are commonly referred to as "executive agreements." L. Henkin, *Foreign Affairs and the Constitution* 173 (1972). They have been described as follows:

> ". . . the President has, from the beginning of the Government, entered into various forms of agreements with foreign countries which, while they fall short of treaties in that they do not follow the prescribed constitutional methods for the conclusion of treaties, are nevertheless valid and binding.
>
> • • •
>
> "Agreements concluded by the President which fall short of treaties are commonly referred to as executive agreements and are no less common in our scheme of government than are the more formal instruments—treaties and conventions."

5 G. Hackworth, *Digest of International Law* 397 (1943). See also 2 C. Hyde, *International Law Chiefly as Interpreted and Applied By the United States* 1405 (1951).

The draft *Restatement of the Foreign Relations Law of the United States*, after defining treaties in accordance with Article II,[4] states:

> "Other international agreements, sometimes collectively referred to as 'international agreements other than treaties,' include 'executive agreements pursuant to treaty,' 'Congressional-executive agreements' [i.e., executive agreements pursuant to congressional authorization] and 'sole executive agreements."

Restatement of the Foreign Relations Law of the United States § 302 (Tent. Draft 1 Apr. 1980).

The distinction between treaties and other international agreements, such as executive agreements, has been recognized by this Court and lower federal courts. See, *e.g.*, *United States v. Pink*, 315 U.S. 203, 230 (1942); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 318 (1936); *Neal-Cooper Grain Company v. Kissinger*, 385 F.Supp. 769, 773 (D.D.C. 1974); *Star-Kist Foods v. United States*, 169 F.Supp.

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[4] See page 8, *supra*.

268, 278 (Cust. Ct. 1958), *aff'd*, 275 F.2d 472 (C.C.P.A. 1959). But see *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912); *Hughes Aircraft v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

b. Petitioners have argued in their brief (Pet. Br. 16-17) that the term "treaty" would include international agreements that are not "treaties" under Article II of the Constitution, when that term is used "in its international relations sense." In relation to the facts of this case, the use of such a definition would be highly inappropriate.

The statute which this Court must construe is an act regulating the actions of the United States government with regard to its employment policies toward United States citizens. All parties to this dispute are United States citizens. This case does not involve the interpretation of an international agreement. Petitioners have not brought to this Court's attention any proper, compelling reason for this Court to construe the term "treaty" according to any standard other than the law of the United States.[6]

c. As was stated by the Court of Appeals:

> ". . . under United States law, 'treaties' normally are thought of as one specific category of international agreements requiring a particular procedure and having a particular status."

Rossi v. Brown, 642 F.2d 553, 557 (D.C. Cir. 1980).

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[6] The fact that the actions complained of occurred outside the United States does not change the domestic nature of this dispute. This is an action between United States citizens and their government, in which the proper interpretation of a law of the United States is being contested. In such a case the laws of the United States have extraterritorial effect, and will be determinative of the issues involved. See *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 318 (1936).

Normally, executive agreements are not considered to be "treaties." However, this Court acknowledged an exception to the usual definition of "treaties" when it decided *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

In *Altman* this Court had to determine whether the term "treaty" in the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, 828, included within its ambit international agreements which had not been submitted to the Senate for approval. The Circuit Court of Appeals Act provided for a direct appeal to this Court in cases involving the validity or construction of any "treaty." The international agreement at issue in *Altman* was a reciprocal tariff agreement between the United States and France. In pertinent part, the Court's opinion states:

> ". . . we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties . . . it was thought best to preserve the right to a review by direct appeal or writ of error from a circuit court in certain matters of importance, and, among others, those involving the construction of treaties. We think the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and . . . be subject to direct and prompt review by the highest court of the nation. While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate . . . it was an international compact . . . We think such a compact is a treaty under the circuit court of appeals act . . ."

Altman, 224 U.S. at 600-601 (footnotes omitted).

Thus, "although the term 'treaty' under United States law normally connotes an agreement requiring the ratification of the Senate under Article II of the Constitution,

Altman indicates that it does not invariably carry such a meaning." *Rossi v. Brown*, 642 F.2d at 557. The meaning of the word "treaty" will depend upon "the intent of Congress in enacting the particular provision in which the term appears." *Id.*[6]

d. In the *Altman* case, this Court held that in relation to one particular act of Congress, an executive agreement could be considered a treaty. The Court's holding was intended to apply only to a very specific situation, the appeal to this Court of lower court rulings construing international agreements. In *Altman*, this Court determined that the purposes of Congress in enacting a particular statute would be achieved to a greater degree by defining the term "treaty" broadly, than they would be by defining that word according to its customary meaning.

In light of the ordinary meaning of the term "treaty," and this Court's holding in *Altman*, Amici respectfully submit that it is incumbent upon Petitioners to carry the burden of demonstrating that Congress did not intend to use the ordinary meaning of the term "treaty" in Section 106, if they are to prevail in this action. Petitioners

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[6] Petitioners have cited *Hughes Aircraft v. United States*, 534 F.2d 889 (Ct. Cl. 1976) in support of their argument that the word "treaty" may mean any binding international agreement. (Pet. Br. 20). In *Hughes*, the Court of Claims held that 28 U.S.C. § 1502, which denies that Court jurisdiction over matters arising out of "treaties," denies it jurisdiction over matters arising out of international executive agreements. *Hughes*, *supra* at 903 n. 17. The Court's holding was based upon the assumption that Congress' intent in denying the Court jurisdiction over matters arising from "treaties" (the desire to avoid undue judicial interference with the conduct of foreign relations by the executive branch of government) was "equally applicable to both forms of international compact . . ." *Hughes*, 534 F.2d at 903 n. 17. The Court of Claims was equating "treaties" and executive agreements in relation to a limited, specific situation, and only after having determined that the intent of Congress in enacting § 1502 clearly called for such action.

must show that Congress' purposes in enacting Section 106 would be hindered if this Court construes the word "treaty" narrowly. Absent such a showing, this Court must find that the word "treaty" as used in Section 106 was intended by Congress to have its ordinary meaning, *i.e.*, an international agreement brought into force in accordance with Article II of the Constitution.[7]

B. The Legislative History of Section 106 Indicates That Congress Intended the Term "Treaty" In Section 106 To Mean An International Agreement Approved By the United States Senate In Accordance With Article II of the Constitution

1. *Congress Enacted Section 106 in Order To End Employment Discrimination Committed Against United States Citizens Under the Auspices of Executive Agreements*

The Conference Committee Report on H.R. 6531 (the bill which eventually became Pub. L. No. 92-129) discussed the purpose of Section 106 in the following terms:

> "The Senate version contained a provision prohibiting job discrimination against American citizens and their dependents in hiring on United States military bases *in any foreign country.*
>
> * * *
>
> The purpose of the Senate provision is to correct a situation which exists at some foreign bases, primarily in Europe, where discrimination in favor of local nationals and against American dependents in employment has contributed to conditions of hardship for families of American enlisted men whose

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[7] This Court has upheld "the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115 (1939). When the words of a statute are plain, "there is no room for construction." *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 101 (1937).

dependents are effectively prevented from obtaining employment. The House accepts the Senate provision."

H.R. REP. No. 92-433, 92d Cong., 1st Sess. 31, *reprinted in* [1971] U.S. CODE CONG. & AD. NEWS 1495, 1508 (emphasis added).

During the Senate debate on Pub. L. No. 91-129, Senator Hughes stated:

> "Those in the lowest ranks cannot have their wives obtain anything but a tourist visa. They are disqualified from helping themselves. And they are denied the opportunity to work on overseas bases, *by agreement with the countries in which they are located*, and are forced to live in poverty."

117 CONG. REC. 16126 (1971) (emphasis added).

In a similar vein, Senator Cook stated:

> "[I]t was my understanding that there was *an agreement*, through the NATO organization, that those young wives, because they were there on tourist visas, could not get a work permit under any circumstances."

117 CONG. REC. 16126 (1971) (emphasis added).

Senator Schweiker also participated in the debate. He quoted from a study prepared by two Army officers:

> "Most civilian jobs on U.S. installations in Europe are held by local nationals or by persons from another European country. These jobs are classified as local national jobs and American dependents cannot fill the jobs because of this classification."

117 CONG. REC. 16120, 16132 (1971).

Schweiker commented:

> "I bet that we are the only country in the world that has that unique method of discriminating against its enlisted personnel stationed abroad."

Id.

The legislative history of Section 106 reveals that the proponents of that law were concerned with *agreements* which fostered discrimination against American citizens around the world. Congress chose to curtail the employment discrimination practiced by the Department of Defense by sanctioning such discrimination only if it was authorized by a *treaty*. This indicates not only that Congress recognized the distinction between treaties and other international agreements when enacting Section 106, but also that Congress wanted the "treaty" required by Section 106 to be more than an agreement.

Section 106 represents an attempt by Congress to prevent United States citizens from being discriminated against by the executive branch in employment, and to create for itself a greater role in determining when such discrimination might be unavoidable. By providing that discrimination against Americans could be accomplished only through the use of an international agreement needing Senate approval, Congress was able to achieve both of these objectives.[8]

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[8] Petitioners argue that Senator Schweiker's major concern in sponsoring Section 106 was to prevent individual military officers from discriminating against Americans in contravention of Department of Defense policy. (Pet. Br. 34-40). In support of this argument, Petitioners emphasize Senator Schweiker's concern with a memorandum issued by an American commanding officer in Germany, in which the officer directed his subordinates to give preference in employment to foreign nationals over Americans. See Pet. Br. 35; *Rossi v. Brown*, 642 F.2d at 558.

Petitioners ignore the fact that Senator Schweiker was aware that the memorandum to which he objected was in the process of being rescinded during the Senate debate on Pub. L. No. 92-129. *Id.* "[T]hat the particular problem referred to by Senator Schweiker was already being resolved, at least suggests that Congress by enacting Section 106 had more in mind than just 'the caprice of individual officers.'" *Rossi v. Brown*, 642 F.2d at 559.

2. *Legislation Enacted Contemporaneously With Section 106 Confirms That the 92d Congress Did Not Consider Executive Agreements To Be Treaties*

The 92d Congress enacted Section 106 as one response to its concern that the President's use of international executive agreements enabled him to act in the area of foreign affairs without the knowledge of the legislative branch of government. The same concerns were again expressed by the 92d Congress when it enacted the Case Act of 1972, Pub. L. No. 92-403, 86 Stat. 619 (codified at 1 U.S.C. § 112b (1976)) and Senate Resolution 214, 92d Cong., 2d Sess., 118 CONG. REC. 6870 (1972). The distinctions drawn by the 92d Congress between Article II treaties and other international agreements can be clearly seen in both of these later enactments.

a. The Case Act provides that:

> "The Secretary of State shall transmit to the Congress the text of any international agreement, *other than a treaty*, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President."

1 U.S.C. § 112b (emphasis added).

In the Case Act, Congress specifically acknowledged the difference between Article II treaties and other international agreements to which the United States might be a party.

The legislative history of the Case Act reveals Congress' concern about the increasing use of executive agreements to implement American foreign policy:

> ". . . State Department witnesses have readily admitted the Congress has not always been kept adequately informed about the international executive agreements entered into by the President and officials of the executive branch on behalf of the United States.
>
> • • •
>
> Each incident in which such secret agreements become known creates tensions and irritations between the Congress and the executive branch which severely inhibit carrying out an effective foreign policy."

H.R. REP. No. 92-1301, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 3068.

The 92d Congress was concerned that the President was making commitments for our country through secret international agreements. That Congress wanted to be aware of all international obligations that our nation had entered into. The Case Act required the executive branch to transmit to Congress all international agreements *other than treaties* because all "treaties" to which the United States is a party would have been submitted to the Senate for approval pursuant to Article II of the Constitution. The Congress that enacted the Case Act did not consider executive agreements to be treaties.[9]

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[9] The Department of State has acknowledged the refusal of the 92d Congress to equate treaties and executive agreements. In a letter written in 1975 by the Acting Assistant Legal Advisor for Treaty Affairs (discussed at page 8, *supra*) it is stated:

> "In the key and most recently enacted statute bearing on this subject, which is known as the Case Act . . . the Congress clearly marks the distinction between treaty and other international agreements . . .
>
> . . .
>
> On the basis of the foregoing, we conclude that, in the absence of a positive demonstration of a contrary intent indicated in

b. Senate Resolution 214 provided:

> "Whereas the Constitution states *the President of the United States must have the advice and consent of the Senate in order to make treaties*;
>
> Whereas an agreement with Portugal, which would provide for the stationing of American troops overseas and which would furnish Portugal with large amounts of foreign aid, is clearly a matter of sufficient importance to necessitate its submission to the Senate *as a treaty*;
>
> Whereas an agreement with Bahrain, which would provide for the establishment of a new American military base on foreign territory and the stationing of American troops overseas, is clearly a matter of sufficient importance to necessitate its submission to the Senate *as a treaty*: Now, therefore, be it
>
> Resolved, That any agreement with Portugal or Bahrain for military bases or foreign assistance should be *submitted as a treaty to the Senate for advice and consent.*"

S. Res. 214, 92d Cong., 2d Sess., 118 CONG. REC. 6870 (1972) (emphasis added).

Senate Resolution 214 was enacted because the Senate felt that the nature of certain international agreements between the United States and either Portugal or Bahrain, and the broad policy implications of such agreements, made those undertakings ". . . too important to be left to unilateral action by the executive branch." S. REP. No. 632, 92d Cong., 2d Sess. 1 (1972). In Resolution 214, the Senate expressed its recognition of the

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the legislative history of Public Law 92-129 of which we are unaware, the meaning of the word "treaty" in section 106 should be defined as that word is used in Article II of the U.S. Constitution . . ."

Letter from John Boyd, Acting Assistant Legal Advisor for Treaty Affairs, to General Accounting Office Assistant General Counsel James Masterson, dated Aug. 8, 1975 (A. 220, 223).

difference between a "treaty" requiring its approval, and "unilateral action by the executive branch." The Senate that enacted Senate Resolution 214 did not consider executive agreements to be treaties.

c. The District Court refused to read Section 106 *in pari materia* with the Case Act as it did not believe that the two acts dealt with the same subject matter. *Rossi v. Brown*, 467 F.Supp 960, 967 (D.D.C. 1979). The Court of Appeals acknowledged that the subject matter of the two enactments was not the same, but nevertheless considered the use of the term "treaty" in the Case Act to be relevant in construing Section 106. *Rossi v. Brown*, 642 F.d at 561. This analysis was based upon the Court's belief that a similar concern was presented in both statutes (the exercise of greater Congressional control over foreign affairs matters). Additionally, the Court of Appeals thought the use of exactly the same phrase in both statutes to be intentional. *Id.*

Amici urge this Court to accept the Court of Appeals' analysis. Certainly, the meaning ascribed by Congress to a measure enacted in order to mitigate concern over unilateral executive branch actions in the foreign policy area is relevant to an analysis of an earlier measure enacted by the same Congress to mitigate closely related aspects of the same problem. See *United States v. American Building Maintenance*, 422 U.S. 271, 277 (1975); *Overstreet v. North Shore Corporation*, 318 U.S. 125, 131-132 (1943).

The explicit distinction made by the 92d Congress between treaties and executive agreements in both the Case Act and Senate Resolution 214, was an extension of the implicit distinction between those different types of international agreements which that Congress first set forth in Section 106. The Congress that enacted Section 106 did not consider executive agreements to be treaties.

C. The Purpose of Congress in Enacting Section 106 Would Be Promoted By Construing the Term "Treaty" in Section 106 to Mean An International Agreement Approved By the United States Senate In Accordance With Article II of the Constitution

Pursuant to this Court's holding in *B. Altman & Co. v. United States*, 224 U.S. 583 (1912), when construing the word "treaty," one looks to the Congressional purpose in enacting the law containing that word in order to determine whether the particular Congressional purpose would be advanced by either a narrow or a broad construction. As in all cases involving statutory construction, this Court must interpret the words of the statute at issue "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979).

Section 106 of Pub. L. No. 92-129 was intended by Congress to severely limit the extent to which United States citizens working for the Department of Defense in foreign countries would be subject to employment discrimination. A narrow construction of the term "treaty" in Section 106 (using the Article II definition) would promote the purpose of Congress in enacting Section 106 more than would an expansive definition. An expansive definition, holding the term "treaty" to mean all international agreeemnts, would promote employment discrimination against United States citizens in the dozens of nations where executive agreements providing for such disparate treatment are in force. As was stated by the Court of Appeals, if one were to construe the term "treaty" to encompass all international agreements, "the exception to the ban on discrimination virtually would engulf the general rule." *Rossi v. Brown*, 642 F.2d at 553.

A construction of the term "treaty" which would include all international agreements would avoid the repeal of various preferential employment clauses contained in international agreements to which this nation is a party.

However, such a construction would virtually emasculate Section 106, making it essentially a meaningless enactment. To reach that result, the purpose of Congress in enacting Section 106 would have to be ignored. Clearly, Section 106 is irreconcilable with executive agreements permitting Americans to be discriminated against on the basis of their citizenship.

To the extent that clauses in existing executive agreements cannot be reconciled with Section 106, a subsequently enacted statute, those clauses are repealed.[10] See *Reid v. Covert*, 354 U.S. 1, 18 (1957); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *affirmed on other grounds* 348 U.S. 206 (1955). In this regard, the Court of Appeals stated:

> ". . . Congress was aware of the existence of international agreements providing for preferential hiring of local nationals . . . this was exactly what Congress intended to nullify."[11]

Rossi v. Brown, 642 F.2d at 560.

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[10] Amici assert that the traditional judicial hesitancy to find a repeal by implication should not be as strong when an executive agreement is in conflict with a subsequently enacted statute, as it is when a "treaty" is in conflict with a subsequently enacted statute. (Pet. Br. 25-26). As Petitioners suggest (Pet. Br. 27, n. 16), "the presumption that Congress does not intend to abrogate pre-existing international agreements is based on the Senate's participation in the conclusion of Article II treaties . . ." As such legislative branch participation is usually not a factor in the promulgation of international executive agreements, courts should be less hesitant to find executive agreements to be implicitly repealed, than they would be to find "treaties" to be implicitly repealed.

[11] Throughout their brief, Petitioners warn of the unpredictable consequences which might result (in regard to the relations between the United States and the Republic of the Philippines) should this Court affirm the decision of the Court of Appeals. As such assertions are of no legal relevance to the issues to be decided by this Court, see, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 704 (1974), Amici will not respond to them, other than to note that Petitioners are at liberty to submit the instant agreement to the United States Senate for its approval.

The word "treaty" used in Section 106 should be construed to mean an international agreement which has been approved by the United States Senate pursuant to Article II, Section 2, Clause 2 of the Constitution.

CONCLUSION

For the aforesaid reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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